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The Implications of *Upjohn*

The legal profession has given a confessional-like reverence¹ to the confidentiality that exists between a lawyer and his client. Although the attorney-client privilege cannot quantifiably be proven to have a beneficial effect,² it has existed since the time of Elizabeth I.³ Commentators from Blackstone⁴ to modern tax attorneys⁵ have written of the necessity of the privilege, but no aspect of the privilege has provoked more concern than its application in the corporate setting.⁶

The United States courts of appeals have developed three separate tests for determining whether the privilege applies in the corporate setting,⁷ but in its first hearing on the subject in more than a decade,⁸ the Supreme Court of the United States in *Upjohn Co. v. United States*⁹ determined that the majority's "control group" test was not the appropriate test.¹⁰ In addition, the Court decided that the attorney work-product doctrine could be used in actions to enforce an Internal Revenue Service (IRS) summons.¹¹ The Court left untouched two significant questions. It did not decide which test should be applied to determine if the

1 Steinhaus, *Privileged Communication in Tax Practice: How It Began, Where It Stands*, 15 TUL. TAX. INST. 530, 530 (1965).

2 See Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899 (1980).

3 8 WIGMORE ON EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]; 9 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 201 (1926).

4 W. BLACKSTONE, COMMENTARIES 683 (Gavit ed. 1941). English philosopher Jeremy Bentham was among those who refused to see the benefit of the attorney-client privilege. See J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 246-47 (J. Dumont ed. 1825).

5 Bender, *A Review of Privileged Communications as Applied to Tax Fraud Proceedings*, 23 TUL. TAX INST. 237 (1974); Steinhuas, *supra* note 1.

6 *Selected Materials on Attorney-Corporate Client Privilege*, 35 THE RECORD 360-63 (1980) (bibliography). See Brodsky, *The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege*, 8 SEC. REG. L.J. 123 (1980); Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809 (1980); Note, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281 (1980); Comment, *The Privileged Few: United States v. Upjohn—What's the Scope of the Attorney-Client Privilege for a Corporation?*, 25 S.D. L. REV. 415 (1980).

7 *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963) (the privilege applies only to those employees within the "control group" of the corporation); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir.), *aff'd by an equally divided court*, 400 U.S. 348 (1971) (communication of an employee to a corporate attorney is protected if the communication is made at the direction of a corporate superior and if the subject matter of the communication is within the scope of the employee's work); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (privilege applies if the subject matter test is met and if the communications are made to secure legal advice and the contents of the communication remain confidential).

8 When the Supreme Court decided *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), in January 1981, more than a decade had passed since the Court announced its affirmation of *Harper & Row*. The Court split four-to-four in *Harper & Row* in considering the "subject matter" test.

9 101 S. Ct. at 677. The majority test rejected by the Court was the "control group" test established in the *City of Philadelphia* case. See text accompanying notes 40-42 *infra*.

10 *Id.* at 686.

11 *Id.*

corporate attorney-client privilege attached¹² and also left undecided the degree of necessity the Government must demonstrate to overcome the work-product doctrine when it is asserted in a tax summons enforcement proceeding.¹³

Since *Hickman v. Taylor*,¹⁴ the attorney-client privilege and the attorney work-product doctrine have been closely related.¹⁵ This relationship is natural since the attorney-client privilege protects the communications made between lawyers and clients in the course of representation¹⁶ and the work-product doctrine protects the legal impressions, conclusions and strategies devised by lawyers in anticipation of litigation.¹⁷

Both doctrines were pleaded by the Upjohn Company (Upjohn), a pharmaceutical manufacturing firm, when it was served with an IRS summons issued pursuant to the Service's investigatory powers.¹⁸ An independent audit of Upjohn had found evidence that in January 1976 one of Upjohn's foreign subsidiaries had made payments to foreign officials in order to secure government business.¹⁹ The auditors reported to the corporation's general counsel, who discussed the matter with the chairman of the board. Upjohn's attorneys sent questionnaires to all of Upjohn's overseas managers seeking information about any questionable payments which may have been made by Upjohn employees. A letter from the chairman which accompanied the questionnaire noted that Gerald Thomas, Upjohn's general counsel, had been asked "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government."²⁰ Responses were sent directly to Thomas and he and outside counsel interviewed the recipients of the questionnaire and thirty-three other Upjohn employees.

In March 1976, Upjohn voluntarily filed a report with the Securities and Exchange Commission disclosing the questionable payments. Upjohn also sent a copy of the report to the IRS, which began investigating the tax consequences of the payments. Upjohn officials gave special agents a list of the employees who were interviewed and who had responded to the survey. In November 1976 the IRS issued a summons demanding production of Thomas's files, including the "written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memoranda or notes of interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."²¹ Claiming the attorney-client privilege and the attorney work-product doctrine, the company refused to produce the documents.

The IRS sought enforcement of the summons in the United States District

12 *Id.*

13 *Id.* at 686-88.

14 329 U.S. 495 (1947). *Hickman* created the work-product rule.

15 WIGMORE, *supra* note 3, § 2318. See also *In re Grand Jury Proceeding*, 604 F.2d 798, 802 (3d Cir. 1979).

16 WIGMORE, *supra* note 3, § 2292, at 554; Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956).

17 329 U.S. at 510-11; FED. R. CIV. P. 26(b)(3).

18 The Service acted pursuant to powers granted in I.R.C. § 7602.

19 101 S. Ct. at 681.

20 *Id.*

21 *Id.*

Court for the Western District of Michigan.²² The court adopted a magistrate's opinion that the summons should be enforced²³ and the United States Court of Appeals for the Sixth Circuit affirmed.²⁴ The court found that the communicating employees were outside the "control group" of the corporation and hence could not claim the corporate attorney-client privilege.²⁵

I. The Corporate Attorney-Client Privilege

The attorney-client privilege, one of the oldest in our legal tradition,²⁶ was initially based upon the "oath and honor" of the attorney,²⁷ but in the 1700's it was entirely repudiated as an obstacle to the "judicial search for truth."²⁸ When the privilege re-emerged in the early 1800's, it was considered a privilege of the client and not the attorney.²⁹ Wigmore describes the privilege as based on a policy of promoting freedom of consultation between lawyer and client.³⁰ The drafters of the Model Code of Evidence view the privilege as being justified on the grounds of social policy.³¹

The privilege has not gone without criticism, however. At least one commentator has suggested that the continued vitality of the privilege is merely a political concession to the bar.³² Another critic has suggested that as long as the rule is argued by lawyers, for lawyers and to lawyers, a substantive reason for the rule is unnecessary.³³

A. *Application of the Privilege in the Corporate Setting*

Although the attorney-client privilege was applied to attorneys dealing with corporations at an early date, most of the applications were by inference.³⁴ Judge Wyzanski established an influential test for application of the privilege in

22 The action was brought pursuant to I.R.C. § 7402(b) and § 7604(a).

23 *Upjohn Co. v. United States*, No. K77-Misc. (W.D. Mich. Apr. 28, 1973).

24 600 F.2d 1223 (6th Cir. 1979).

25 *Id.* at 1226-27. The Supreme Court granted certiorari to consider both the "control group" test and the extent of the protection afforded by the attorney work-product rule in the enforcement of IRS summonses. 445 U.S. 925 (1980).

26 See WIGMORE, *supra* note 3.

27 *Id.* at 543.

28 *Id.*

29 *Id.* at 545.

30 *Id.*

31 See MODEL CODE OF EVIDENCE rule 210, comment (1942):

The continued existence of the privilege is justified on the grounds of social policy. In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. . . . The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of evidence in specific cases.

32 Morgan, *Foreword*, MODEL CODE OF EVIDENCE 28 (1942). See Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

33 Weissenberger, *supra* note 2, at 899. Professor Radin more than a half-century ago criticized the attorney-client privilege as an impediment to the search for truth. Radin, *supra* note 32, at 490.

34 See, e.g., *United States v. Louisville & N. R.R.*, 236 U.S. 318, 336 (1915). See also *Schwimmer v. United States*, 232 F.2d 855, 863-64 (8th Cir. 1956); *Cole v. Hughes Tool Co.*, 215 F.2d 924, 930-31 (10th Cir. 1954); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954); *Ex parte Schoepf*, 74 Ohio St. 1, 15, 77 N.E. 276, 279 (1905).

United States v. United Shoe Machinery Corp.,³⁵ where he presumed that the privilege could be applied in a corporate situation. Judge Wyzanski also held that there was no difference between in-house counsel and outside counsel for the purposes of applying the privilege, and that the privilege could extend to all employees.³⁶

Until *Upjohn*, the most important decision on the corporate attorney-client privilege may have been one which was quickly overturned. Chief Judge Campbell of the United States District Court for the Northern District of Illinois ruled in *Radiant Burners v. American Gas Association*³⁷ (*Radian Burners I*) that the attorney-client privilege does not apply to corporate clients. He found that the privilege, like the privilege against self-incrimination, was fundamentally personal in nature and therefore could not be claimed by a corporation, which he termed a "mere creature of the state."³⁸ The decision ended the judicial inclination to assume that the privilege applied in the corporate setting and touched off a flurry of commentary on the question.³⁹

Before *Radiant Burners I* was reviewed by the Seventh Circuit, another district court, in *City of Philadelphia v. Westinghouse Electric Corp.*,⁴⁰ rejected Judge Campbell's position. The court found that the attorney-client privilege does apply to a corporation, but only to those employees within the company's "control group." The court defined that group as consisting of those persons "in a position to control or even to take substantial part in a decision about any action

³⁵ 89 F. Supp. 357 (D. Mass. 1950). In his decision, Judge Wyzanski stated that the privilege applies if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either
 - (i) an opinion on law or
 - (ii) legal services or
 - (iii) assistance in some legal proceeding, and not
 - (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.

Id. at 358-59.

³⁶ *Id.* at 360.

³⁷ 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd* 320 F.2d 314 (7th Cir. 1963).

³⁸ *Id.* at 773.

³⁹ See, e.g., Austern, *Corporate Counsel Communications: Is Anybody Listening?*, 17 BUS. LAW. 868 (1962); Gardner, *A Personal Privilege for Communications of Corporate Clients — Paradox or Public Policy?*, 40 U. DET. L.J. 299 (1963); Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (1962); Haight, *Keeping the Privilege Inside the Corporation*, 18 BUS. LAW. 551 (1963); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 ILL. B.J. 376 (1965); Jox, *Attorney-Client Privilege—Its Application to a Corporate Client*, 3 WASHBURN L.J. 33 (1964); Schaefer, *The Attorney-Client Privilege in the Modern Business Corporation*, 20 BUS. LAW. 989 (1965); Sedler and Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1 (1963); Note, *Attorney-Client Privilege as Applied to Corporations*, 48 CORNELL L.Q. 551 (1963); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment*, 56 NW. U.L. REV. 235 (1961); Comment, *Attorney-Client Privilege: Does It Apply to Corporations?*, 12 DE PAUL L. REV. 263 (1963); Comment, *The Applicability of the Attorney-Client Privilege to a Corporation—The Current Evolution of an Accepted Rule of Law*, 17 MIAMI L. REV. 382 (1963); Comment, *Applicability of the Attorney-Client Privilege to the Corporate Client*, 57 NW. U.L. REV. 596 (1962).

⁴⁰ 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

which the corporation may take upon the advice of the attorney."⁴¹ These persons were thought to personify the corporation and were therefore allowed to claim the privilege.⁴²

Shortly after the *City of Philadelphia* decision, the Seventh Circuit reversed the *Radiant Burners I* decision.⁴³ The appellate court found that the attorney-client privilege is a privilege of the client "without regard to the non-corporate character of the client"⁴⁴

In the wake of *Radiant Burner I* and *City of Philadelphia*, two additional tests were developed.⁴⁵ The Seventh Circuit, finding the "control group" test too rigid, established the "subject matter" test in *Harper & Row Publishers, Inc. v. Decker*.⁴⁶ The court found an employee's communication privileged if a corporate superior directed that the communication be made and if the subject matter was within the duties of the employee.⁴⁷ In *Diversified Industries, Inc. v. Meredith*,⁴⁸ the Eighth Circuit created the "modified subject matter"⁴⁹ or Weinstein test.⁵⁰ This test, a variation of the "subject matter" test, added the requirements that a superior must request the communication to secure legal advice and the communication may not be disseminated beyond those corporate personnel who need to know its contents.⁵¹

The "control group" test was the test most frequently followed by the lower courts.⁵² Some commentators praised it as the "bright line" test,⁵³ but others found it to be too inflexible.⁵⁴ Justice Rehnquist apparently was among the crit-

41 *Id.* at 485.

42 *Id.*

43 320 F.2d 314 (7th Cir. 1963).

44 *Id.* at 322.

45 See note 7 *supra*.

46 423 F.2d 487 (7th Cir. 1971), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

47 *Id.* at 491-92.

48 572 F.2d 596 (8th Cir. 1978) (en banc).

49 *Id.* at 609.

50 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1975).

51 572 F.2d at 609.

52 Weissenberger, *supra* note 2, at 909-10. Among the decisions accepting the "control group" test are: *In re Grand Jury Investigation* (Sun Oil Co.), 599 F.2d 1224 (3d Cir. 1979); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *Jarvis, Inc. v. AT&T Co.*, 84 F.R.D. 286 (D. Colo. 1979); *In re Anthracite Coal Antitrust Litigation*, 81 F.R.D. 516 (M.D. Pa. 1979); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *United States v. IBM Corp.*, 66 F.R.D. 154 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973); *Garrison v. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963). The "control group" test was adopted in the original draft of the Proposed Federal Rules of Evidence. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF THE PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 503 (1969). However, as the other tests were developed, the drafters of the federal rules decided to make their proposal reflect the split in the courts and dropped the "control group" test. Rules of Evidence for the United States Courts and Magistrates, Rule 503, 56 F.R.D. 183, 235-40 (1973). In the end, Congress decided that privileges should be continued as developed by common law. FED. R. EVID. 501.

53 Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 430 (1970). The Third Circuit adopted that language in deciding *In re Grand Jury Investigation*, 599 F.2d at 1235-37.

54 Kobak, *supra* note 2, at 351. See, e.g., Brodsky, *The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege*, 8 SEC. REG. L.J. 123 (1980); Weinschel, *Corporate Employees Interviews*, 12 B.C. IND. & COMM. L. REV. 873, 879 (1971); Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 CATH. LAW. 138, 146-47 (1976); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 375 (1970); Comment, 47 GEO. WASH. L. REV. 413, 424-25 (1979); Comment, *Corporate Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith—The Modified Harper & Row Test*, 4 J. CORP. LAW 226, 229-30 (1978); Comment, *The Privileged Few: United States v. Upjohn—What Is*

ics, for he rejected the test in deciding *Upjohn*. He wrote that "the narrow 'control group test' sanctioned by the Court of Appeals in this case cannot . . . govern the development of the law in this area."⁵⁵ Justice Rehnquist reasoned that the "control group" test overlooked the fact that the attorney-client privilege protects not only professional advice given to corporate employees by counsel, but also information given to counsel by employees so that counsel may give the corporation "sound and informed advice."⁵⁶ In the corporate setting, he wrote, many middle level employees may have information that the corporate attorney should have. These employees may "embroil the corporation in serious legal difficulties" because they fail to make the attorney aware of the information they possess.⁵⁷ The "control group" test frustrates the purpose of the privilege "by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."⁵⁸ Finally, Justice Rehnquist opined that the corporate attorney-client privilege must be reasonably predictable to be effective, and that the disparate lower court opinions revealed how unpredictable the "control group" standard is.⁵⁹

B. *Did the Upjohn Court Accept the Weinstein Test?*

In rejecting the "control group" test, the *Upjohn* Court did not announce which test should be used to determine if the corporate attorney-client privilege attached.⁶⁰ However, considerable similarities between the *Upjohn* and the *Diver-*

the Scope of the Attorney-Client Privilege for a Corporation?, 25 S.D. L. REV. 415, 429 (1980); Comment, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 761 (1971).

55 101 S. Ct. at 686.

56 *Id.* at 683.

57 *Id.*

58 *Id.* at 684.

59 *Id.* Justice Rehnquist cited as evidence of this unpredictability *Natta v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom. Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968), in which the control group included managers and assistant managers of the corporation's patent division and research and development departments, and *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973), in which the control group included only division and corporate vice-presidents and not two directors of research and the vice-president for production and research. 101 S. Ct. at 684.

Despite his criticism that the "control group" test leads to unpredictable results, Justice Rehnquist did not articulate a standard which would be more predictable. It is on this point that Chief Justice Burger, in a brief concurring opinion, scored the majority stance. He contended that even though the Federal Rules of Evidence call for a case-by-case determination of privilege, rule 501 also provides that the law of privileges shall be governed by the principles of common law as interpreted by the courts of the United States. *Id.* at 689 (Burger, C.J., concurring). The Chief Justice argued that as a general rule a communication is privileged when an employee or former employee speaks with an attorney at the direction of management about matters within the scope of the employee's work. The attorney must be one authorized to inquire into the subject and must be

seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. Although the Chief Justice cited *Diversified Industries, Harper & Row* and *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975), for his proposition, it appears that he has taken the "modified subject matter" test and explained more fully which communications may be covered.

60 The Court noted that the parties and "various amici" suggested that the Court was deciding between which of two tests to apply, but responded that the Court decides "concrete cases and not abstract propositions of law." *Id.* at 681. The Court declined to lay down "a broad rule or series of rules to govern all conceivable future questions in this area," *id.*, on the ground that to do so would contravene the intent of the Federal Rules of Evidence which seek a case-by-case application of privileges. *Id.* at 686. The Court's opinion is consistent with the route suggested by the petitioners, who proposed that the Court

sified Industries cases in both fact and law may produce some guidelines for corporate counsel to follow when considering whether or not an intracorporate communication is privileged.

In *Diversified Industries*, Weatherhead Corporation (Weatherhead) brought suit in July 1975 alleging that employees of Diversified Industries (Diversified) had bribed Weatherhead employees to purchase inferior copper from Diversified. Weatherhead sought discovery of a report by a Washington, D.C. law firm which Diversified had retained to investigate its business practices. Diversified resisted discovery, relying on the attorney-client privilege and the attorney work-product doctrine.⁶¹ The Eighth Circuit, using the Weinstein "modified subject matter" test, found on rehearing that the law firm's report was privileged.⁶² The court relied upon a familiar policy theme found in many of the decisions upholding the corporate attorney-client privilege:

To be sure, there are possibilities of abuse, but the application of the attorney-client privilege to this matter and others like it will encourage corporations to seek out and correct wrong-doing in their own house and to do so with attorneys who are obligated by the Code of Professional Responsibility to conduct the inquiry in an independent and ethical manner.⁶³

Factually, the only difference between *Upjohn* and *Diversified Industries* is that in the latter case outside counsel conducted the investigation,⁶⁴ while in *Upjohn* the company's general counsel, aided by outside counsel, conducted the investigation and drafted the report.⁶⁵

Justice Rehnquist appears to have followed the "modified subject matter"⁶⁶ test. In holding that the privilege existed, he stated that the communications

- (1) were made by Upjohn employees
- (2) to counsel for Upjohn acting as such
- (3) at the direction of corporate superiors
- (4) in order to secure legal advice from counsel
- (5) concerning matters within the scope of the employees' duties
- (6) and were made by employees who "were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."⁶⁷

These criteria follow the model suggested by Judge Weinstein in *Diversified Industries*.⁶⁸ The only significant difference between the "modified subject matter" test and Justice Rehnquist's analysis is that the "modified subject matter" test specifies that the information for which the privilege is sought must not be dis-

adopt a "more flexible approach" than the Weinstein approach, "perhaps awaiting further developments in the lower courts." Petitioners' Reply Brief at 9.

61 572 F.2d at 599-601.

62 *Id.* at 611. The appellate court agreed to rehear the case *en banc* after a three-judge panel had denied the petition for a writ of mandamus. The panel had found that the communications were not privileged and ordered them disclosed.

63 *Id.* at 610.

64 *Id.* at 599.

65 101 S. Ct. at 681.

66 2 J. WEINSTEIN, *supra* note 50.

67 101 S. Ct. at 685. This analysis of *Upjohn* was adopted by the district court in *Baxter Travenol Laboratories v. LeMay*, No. C-3-80-362 (S.D. Ohio, Feb. 19, 1981). The court did not, however, see the Supreme Court as having sanctioned the modified subject matter case. One commentator, however, has contended that the Court did adopt the modified subject matter test. Feld, *Supreme Court in Upjohn Protects Attorney-Client Privilege: Upholds the Work-Product Doctrine*, 54 J. OF TAX. 210 (1981).

68 572 F.2d at 609. The Court quotes favorably from *Diversified Industries* at 101 S. Ct. at 683-84.

seminated beyond those who need to know it. While Justice Rehnquist does not mention this in his analysis, unnecessary dissemination of material would constitute a waiver of the privilege. Therefore, the fact that this element is not mentioned does not signify a departure from the "modified subject matter" test.⁶⁹

C. *The Implications of Upjohn for the Corporate Attorney-Client Privilege*

Corporate counsel attempting to draw guidelines from *Upjohn* may take comfort from the fact that the decision affords corporate counsel greater protection from discovery than did the "control group" test.⁷⁰ Because of the similarity of *Upjohn* and *Diversified Industries*, it appears safe for counsel to follow the "modified subject matter" test to determine when the attorney-client privilege will attach in the corporate setting.

The key element of the Weinstein test is that the information communicated to the corporate attorney by the employee must be within the scope of that person's employment. Judge Weinstein used the example of an employee who saw an accident involving corporate equipment while he was enroute to work. His communication of that information to the corporate counsel would not be privileged, since the information would not be related to the scope of the employee's work.⁷¹ If there were an accident involving equipment operated by the employee while at work, that information could be privileged if communicated to counsel, since it would be within the scope of the employee's employment. The importance of this element of the Weinstein test is that it prevents the "funneling" of information to corporate counsel. Critics opposed to the use of the attorney-client privilege in the corporate setting have worried about employees "funneling" information to counsel in an effort to garner privileged status for such information.⁷² Judge Weinstein reasoned that the scope of employment requirement would prevent such funneling.⁷³

As with all privilege questions, it is the communication that is privileged,

69 Judge Weinstein in his treatise on evidence stated that the one element of the attorney-client privilege that is inherent in seeking the privilege is that there has been no waiver of it. Therefore, one element of the privilege formulation "has always been that the communication must have been intended to be confidential." 2 J. WEINSTEIN, *supra* note 50, at 503-43. See WIGMORE, *supra* note 3, § 2311.

70 Former Solicitor General Erwin Griswold, who submitted an *amicus* brief in *Upjohn* for the American College of Trial Lawyers, sees the decision as having a wide-ranging effect on corporate relations. Griswold said that the ruling could apply to situations such as the witnessing of an accident by a company truck driver. If that employee has facts about an accident involving the company and communicates those facts to the company attorney, Griswold said, "it would seem that what he says is now privileged." *Companies Win Broader Attorney-Client Privilege*, Nat. Law J., Jan. 26, 1981, at 3. If the Court has accepted the Weinstein test, then Dean Griswold and Judge Weinstein disagree as to the effect of the ruling since given a similar set of facts, Judge Weinstein has said that the privilege would not apply. See 2 J. WEINSTEIN, *supra* note 50, at 503-04.

71 *Id.*

72 See, e.g., Note, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281, 1288 (1980).

73 The fear is that employers will instruct their employees to transmit information to the corporate attorney, in effect "funneling" information to the attorney so that the privilege would attach. See Note, *supra* note 72, at 1298-99. The flaw in this argument is that the attorney-client privilege only protects the communication to the attorney. It does not protect the information itself, which is still available from the client. Of course, retrieving that information from the client is not nearly as convenient as raiding an opposing attorney's files. The additional protection offered by the Weinstein test is that to garner the privilege the information communicated must be within the employee's scope of employment and must be communicated with the intent of receiving legal advice.

not the facts.⁷⁴ The attorney cannot be compelled to disclose the communication made to him, but the employee is still subject to questioning about the incident. The "modified subject matter" test should thus prevent abuse of the privilege while properly enlarging the zone of protection for communications by employees to corporate counsel. It will also protect corporations attempting to investigate allegations of internal wrongdoing.

II. The Attorney Work-Product Doctrine

Cases factually similar to *Upjohn* should be argued primarily under attorney-client privilege. If the corporate communicator can be identified as a client for the purposes of the attorney-client privilege, then the protection afforded those communications is absolute.⁷⁵ However, as in *Upjohn*, it may also be necessary to argue the attorney work-product doctrine—the protection of which may not be absolute.

The Sixth Circuit had surprised the parties in *Upjohn* by saying in a footnote that the work-product doctrine did not apply to actions enforcing an IRS summons.⁷⁶ However, the Government elected not to argue in support of that finding and in its brief acknowledged that the rule did apply to an IRS summons.⁷⁷ Justice Rehnquist noted that the Government was wise in conceding the point.⁷⁸ The Court remanded the case for review of *Upjohn's* contention that notes taken by the firm's general counsel during interviews with its employees are protected by the work-product doctrine.⁷⁹

The IRS had sought discovery of the questionnaires sent to *Upjohn* employees and the notes and memoranda of the general counsel's interviews with employees. *Upjohn* asserted the attorney-client privilege as a defense to the discovery of the questionnaires, but asserted the work-product doctrine to block discovery of the general counsel's notes and memoranda of interviews that went beyond mere recording of responses.⁸⁰ Although the Supreme Court found that

⁷⁴ See generally Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 954-55 (1956).

⁷⁵ One commentator has suggested that before a court determines whether the attorney-client privilege applies in an action to block the discovery of materials, it should decide whether the attorney work-product doctrine offers protection. This was suggested because of the difficulty courts have in isolating the corporate client for the purpose of attaching the attorney-client privilege. See Note, *supra* note 72. There are two problems with this approach, however. First, the issue may be settled if the attorney-client relationship is established since the privilege is absolute. Second, if the communication is found to fall within the work-product doctrine, the protection may not be absolute.

Two recent cases, factually similar to *Diversified Industries*, have been decided under the work-product doctrine. The Second Circuit, in deciding *In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979), did not determine if the attorney-client privilege applied because the materials involved in the action fit neatly into the work-product doctrine. The court reversed a contempt finding issued by the lower court against an attorney who refused to disclose the materials.

The Third Circuit, in *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), decided that all of the materials in issue (similar to those in *Upjohn*) were protected under the work-product doctrine except a questionnaire completed by an employee who later died and notes of an interview with that person, conducted by the attorney. Both cases offer courts alternatives when dealing with this type of case. However, the rejection of the "control group" test in *Upjohn* should make such alternatives unnecessary, since it should be easier now to include a corporate employee in the class of protected persons.

⁷⁶ 600 F.2d at 1228 n.13.

⁷⁷ Respondent's Brief at 16.

⁷⁸ 101 S. Ct. at 686.

⁷⁹ *Id.* at 689.

⁸⁰ *Id.* at 686.

the magistrate who originally considered the case applied the wrong standard in resolving the work-product issue,⁸¹ it did not specify which standard should be applied. Therein lies the second unanswered question of *Upjohn*.

A. Hickman v. Taylor

The work-product doctrine, first stated by the Supreme Court in *Hickman v. Taylor*⁸² and later adopted in rule 26(b)(3) of the Federal Rules of Civil Procedure,⁸³ is one of the critical standards of American law governing pretrial discovery.⁸⁴ The doctrine protects from discovery the products of an attorney which are prepared in anticipation of litigation.⁸⁵ However, two questions about the rule remain unanswered: (1) whether the protection is qualified or absolute, and (2) if it is qualified, what burden of proof the party seeking discovery must sustain in order to overcome the protection afforded by the doctrine.

The court of appeals in *Hickman* categorized the work in question as "the work product of the lawyer,"⁸⁶ an expression which the Supreme Court accepted.⁸⁷ Another court has since defined work product as "the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of relevant facts, preparation of legal theories, planning of strategy and recording of mental impressions."⁸⁸ There has been little question that the rule applies to attorneys working for corporations.⁸⁹

81 *Id.* at 688.

82 329 U.S. 495 (1947).

83 FED. R. CIV. P. 26(b)(3) states:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

84 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2022, at 183 (1970).

85 329 U.S. at 510-11. *See* *Diversified Indus., Inc. v. Meredith*, 572 F.2d at 603; *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929-30 (N.D. Cal. 1976); C. WRIGHT & A. MILLER, *supra* note 84, §§ 2017, 2021-28.

86 153 F.2d 212, 223 (3d Cir. 1945).

87 329 U.S. at 511.

88 *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1979).

89 *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 842 (8th Cir. 1973). The obvious limitation is that the attorney must be performing actual legal work, not simply working as an accountant, a tax preparer or a businessman. *See* *United States v. Vehicular Parking Ltd.*, 52 F. Supp. 751 (D. Del. 1943); *Maurer, Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352, 372 (1967); Simon, *supra* note 74, at 973-74.

Agency theory has also been offered as a justification for applying the attorney-client privilege to corporations. Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 241 (1965), and the argument can logically be extended to the work-product doctrine and its application to corporate relations. An employee can work as an agent of a corporation. If an attorney works with that agent in preparing materials anticipatory of litigation, the attorney can obviously claim the work-product doctrine protection. The safeguard in this system is that the materials protected by the doctrine must be prepared in anticipation of litigation, thus excluding routine business recordkeeping.

1. An Absolute or Qualified Protection?

Despite the firm legal basis for the work-product doctrine, some dispute remains as to the extent of the doctrine's protection.⁹⁰ The doctrine is the product of a clash between the desire for broad and liberal discovery and the concern for protecting the privacy of lawyers preparing for litigation.⁹¹ Wigmore noted that all privileges must be narrowly construed,⁹² but the work-product doctrine has been, at times, broadly applied.⁹³

Hickman established the initial boundaries of the work-product doctrine. In that case the discovering party sought statements from the defendant company's attorney, who had prepared memoranda following an interview with the four surviving crew members of a sunken tug boat. The district court found the attorney in contempt when he refused to produce the subpoenaed materials. The court of appeals reversed the lower court's decision, holding that such material was fully privileged.⁹⁴ The Supreme Court affirmed, but on different grounds. The Court deemed the interrogatories to be "simply an attempt, without purported necessity or justification"⁹⁵ to acquire materials prepared by the opposing attorney. The Court said the attorney's memoranda fell outside of "the arena of discovery."⁹⁶ The Court noted that although attorneys are officers of the court and are bound to work for the advancement of justice,⁹⁷ they must be able to work with a certain degree of privacy, free from unnecessary intrusion.⁹⁸ Proper preparation of a case demands that an attorney "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."⁹⁹ The Court noted that if the "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible[s]"¹⁰⁰ were open to discovery, they would likely go unwritten and justice would suffer.¹⁰¹ The Court added that it did not mean that all written materials prepared by counsel with "an eye toward litigation are necessarily free from discovery in all cases."¹⁰² The burden rests on the party invading the attorney's files to show adequate reason.¹⁰³

The Court distinguished written statements produced by the attorney and oral statements made to him during interviews. Discovery of the written materials required a showing of necessity, but discovery of the oral statements required

90 Compare *In re Grand Jury Proceeding*, 473 F.2d at 848, and *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976) (absolute protection under the work-product doctrine), with *In re Grand Jury Subpoena* Dated Nov. 8, 1979, 622 F.2d at 936, and *In re Grand Jury Subpoena*, 599 F.2d at 1231 (protection not absolute).

91 Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 334-37 (1978).

92 WIGMORE, *supra* note 3, § 2292, at 554.

93 See, e.g., *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943 (conferring absolute protection on all opinion work product).

94 329 U.S. at 498-500.

95 *Id.* at 510.

96 *Id.*

97 *Id.*

98 *Id.* at 510-11.

99 *Id.* at 511.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

something more. The Court noted that in *Hickman* no showing could be made which would justify production of the oral statements,¹⁰⁴ and added that it would be a "rare situation"¹⁰⁵ which justified such discovery.

The Court appeared to be acknowledging a different standard of discovery for written memoranda than for the attorney's mental impressions and recollections. That difference was adopted in the Federal Rules of Civil Procedure. Rule 26(b)(3) states:

[A] party may obtain discovery of *documents and tangible things* otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation . . . by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the material by other means.¹⁰⁶

The rule adds that in ordering discovery upon the making of the required showing, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."¹⁰⁷

The two sentences of the rule are complementary.¹⁰⁸ The first instructs the court as to what standard is required for the discovery of documents and tangible things. The second instructs that in the discovery of tangible things and documents, the court must protect against the discovery of mental impressions. There is thus a distinction between tangible documents and what has been called the "opinion work product" of an attorney.¹⁰⁹

2. A Higher Burden of Proof for Discovery of Opinion Work-Product

There appears, then, to be a hierarchy of privileges against discovery. The Supreme Court selected the middle ground in *Hickman*, after both the district court and the appellate court chose the extreme positions. The ensuing commentaries¹¹⁰ and the resulting case law¹¹¹ point to a pattern which may be useful in determining how the attorney work-product doctrine is to be applied.

The attorney-client privilege, which developed independently of the work-product doctrine,¹¹² is the strongest of these exceptions to discovery since it is absolute. Next, there appears to be a category for the attorney opinion work product.¹¹³ Courts have found that this work product is either immune from

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 513.

¹⁰⁶ FED. R. CIV. P. 26(b)(3) (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ *See* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974).

¹⁰⁹ *Id.*; *see generally* Note, *supra* note 91. One commentator has explained that "the Court also drew a distinction . . . by which so much of the work product as may reflect the mental impressions or opinions of the lawyer was, for practical purposes, absolutely immune from discovery." C. WRIGHT & A. MILLER, *supra* note 84, § 2022, at 188.

¹¹⁰ *See, e.g.*, Note, *supra* note 91.

¹¹¹ *See, e.g.*, cases cited in note 90 *supra*; United States v. Gates, 35 F.R.D. 524, 526 (D. Colo. 1964).

¹¹² *In re* Grand Jury Proceeding, 473 F.2d at 844. The attorney-client privilege obviously greatly pre-dates the attorney work-product doctrine, which was not formally accepted until 1947. However, the two rules, despite being independent in development, are complementary in the protection they offer an attorney working in anticipation of litigation. *But cf.* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929-30 (N.D. Cal. 1976) (policies and purposes of the work-product doctrine differ from those underlying the attorney-client privilege).

¹¹³ *See, e.g.*, 509 F.2d at 732; *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

discovery¹¹⁴ or virtually immune, granting discovery only when the material is evidence of a crime or when the material requested is "at issue."¹¹⁵ Finally, there are tangible documents produced by the lawyer in anticipation of litigation. If they do not contain a lawyer's mental impressions, conclusions, opinions or legal theories, these materials "are discoverable by an adversary party upon a showing of substantial need and undue hardship."¹¹⁶

A number of courts have apparently endorsed the concept of a hierarchy of privileges¹¹⁷ by granting greater protection to work done by an attorney in prep-

114 See, e.g., *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974).

115 *In re* Murphy, 560 F.2d at 337 n.19 (attorney's file contains inculpatory evidence of attorney's own illegal activities); *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802 (3d Cir. 1979) (corporate attorney's papers may disclose whether the company he represented made false statements during an initial grand jury investigation).

116 FED. R. CIV. P. 26(b)(3). See *In re* Grand Jury Subpoena, 599 F.2d 504, 512 (2d Cir. 1979); *In re* Natta, 410 F.2d 187, 193 (3d Cir. 1969); *Barr Marine Products Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 633-34 (E.D. Pa. 1979); *Jarvis, Inc. v. AT&T Co.*, 84 F.R.D. 286, 293 (D. Colo. 1979).

117 *In re* Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979), the Second Circuit said that production of information might be justified where witnesses are no longer available or can be reached only with difficulty. The court limited its holding to written statements, saying that "the same is not true for oral statements made by witnesses to the attorney." *Id.* at 512. As a result, the court found that all of the materials sought in this case were the work product of the attorneys and that a showing of necessity "in differing degrees" was necessary to secure their discovery. *Id.* The court found the level of necessity offered by the Government to be insufficient to compel discovery, particularly in light of the otherwise high level of cooperation shown by the company being investigated.

The Sixth Circuit, in *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933 (6th Cir. 1979), also found that memoranda sought by an opponent may be discovered only in rare and extraordinary circumstances. *Id.* at 936.

The Fourth Circuit in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), determined that during litigation the opinion work product of an attorney enjoyed an absolute privilege against discovery. The court stated that the absolute privilege becomes qualified once the litigation is terminated and the material is sought in a subsequent action. *Id.* at 733.

The Eighth Circuit also adopted the absolute immunity standard for an attorney as to his personal recollections, notes or memoranda from interviews, *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973), as did the district court in *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976). The district court found that an attorney's notes from an interview with a witness were "in the pure *Hickman* category." *Id.* at 949. The court said that such notes "are so much a product of the lawyer's thinking and so little probative of the witnesses' actual words that they are absolutely protected from disclosure." *Id.* The court also noted that memoranda of law and notes used in preparing them, made in anticipation of litigation, are also clearly protected by the work-product doctrine. *Id.*

The Eighth Circuit reconsidered its position in *In re* Murphy, 560 F.2d 326 (8th Cir. 1977), and concluded again that opinion work product is virtually undiscoverable:

It is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product can not be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the material by alternative means without undue hardship. . . . In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. . . . Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions.

Id. at 336. The court went on to find that opinion work product may not be immune if it contains inculpatory material of illegal activities by the attorney. The court noted that this was an "unresolved question" in many circuits, but said that its holding constituted a logical extension of the attorney-client privilege. *Id.* at 337. Since the attorney work-product doctrine is broader than the attorney-client privilege, though, traditional exceptions to the privilege cannot be "automatically engrafted" onto the work-product doctrine. *Id.* Nonetheless, the court found that the inculpatory material exception *might* apply to the work-product doctrine, though it declined to apply it here.

See also *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 932 (N.D. Cal. 1976) (work-product doctrine offers virtual immunity, the exception being when the attorney's actions are "at issue"); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975); *Bud v. Penn Cent. Co.*, 61 F.R.D. 43 (E.D. Pa. 1973); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979 (E.D. Wis. 1969). The United States District Court for the Eastern District of Wisconsin refined the position it

aration for litigation which may reveal an attorney's mental impressions and strategies. Despite favorable mention by commentators and the courts, acceptance of the opinion work-product theory is not widespread. Many courts continue to view attorney work product as a one-dimensional doctrine blocking discovery unless substantial need or undue hardship can be shown. However, the language and history of *Hickman* and the language of rule 26(b)(3) clearly indicate an intent to differentiate between the ordinary attorney work product and opinion work product. Under this theory, an attorney's opinion work product would be much less available than such materials as verbatim statements taken from witnesses in preparation for trial. An attorney preparing for litigation should know that unless the materials he prepares are "at issue" in the controversy or contain inculpatory information, they will be protected from discovery. As Justice Jackson stated in his concurring opinion in *Hickman*, "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."¹¹⁸

The Supreme Court in *Upjohn* acknowledged the distinction between ordinary and opinion work product. The Court noted that rule 26 "accords special protection to work product revealing the attorney's mental processes."¹¹⁹ Using much the same analysis as the Fourth Circuit employed in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,¹²⁰ the Court said that the *Hickman* decision had "stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes."¹²¹ While acknowledging that some courts found an absolute immunity for work product based upon oral statements from witnesses,¹²² the Court refused to rule on this issue. Instead, it found that the magistrate in *Upjohn* used the wrong standard when he applied the "substantial need" and "undue hardship" test.¹²³ The Court concluded that the notes and memoranda sought revealed the attorneys' mental processes in evaluating the communications, and declared: "As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."¹²⁴

After seemingly embracing the absolute or virtually absolute immunity standard for opinion work product, the *Upjohn* Court did not rule that such material is always protected by the work-product doctrine.¹²⁵ Instead, the Court noted that a "far stronger" showing of necessity and unavailability by other means than was made would be necessary to compel disclosure.¹²⁶

took in *Kearney & Trecker* when it ruled 10 years later that interview memoranda are virtually immune from discovery. *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979). The court would not, however, sanction the "at issue" or evidence of a crime exceptions to the doctrine. *Id.* at 375.

One commentator defended the use of these two exceptions on the ground that they "further the ultimate goal of the judicial system of eliciting truth and justice." See *supra* note 91, at 343.

118 329 U.S. at 516 (Jackson, J., concurring).

119 101 S. Ct. at 688.

120 509 F.2d 730 (4th Cir. 1974).

121 101 S. Ct. at 688.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 688-89. The Court remanded the case for a determination of whether the Government could show a degree of necessity for production of the materials which was higher than the substantial need

The position taken by the Supreme Court leaves three alternatives for the Sixth Circuit. First, it could embrace the absolute immunity standard for attorney opinion work product. Second, it could establish the "virtually immune" standard, allowing discovery of opinion work product only when the attorney's information is "at issue" or is material evidence of a crime or fraud. Finally, the court could establish an "intermediate level" of scrutiny between the undue hardship/substantial need standard and the virtually immune standard.

The absolute immunity standard is unappealing because it does not deal with the situation in which the attorney's work product materials are at issue. The "virtually immune" standard offers nearly as much protection as the absolute standard while allowing two narrow, necessary exceptions. *Hickman* and rule 26(b)(3) clearly show an intent to offer special protection for the opinion work product of attorneys. However, to make such work product absolutely immune from discovery even when the material could be evidence of a crime would be undesirable. Thus, the virtually immune standard offers the greatest protection for attorney work product while not allowing the privilege to hide evidence of a crime. The "intermediate level" of scrutiny is unappealing since it would only further fractionalize an area of the law already susceptible to confusion.

III. Conclusion

The *Upjohn* case will be viewed as a landmark decision in the law of evidence and corporations. It reaffirms that corporations can, in fact, be clients for the purpose of the attorney-client privilege. The Supreme Court wisely rejected the restrictive "control group" test, which in its rigidity failed to take into account the need for flexible communications within corporations.¹²⁷ While the Court appears to have followed the "modified subject matter" test, it refused to specify which test is to be followed in the future. This is unfortunate, since a definitive test would have given corporate counsel guidance in managing the legal affairs of their companies. Nonetheless, because of the great similarity in the reasoning of the Supreme Court in *Upjohn* and the Eighth Circuit in *Diversified Industries*, it appears that the Court has sanctioned the Weinstein test by inference.

As to the attorney work-product doctrine, there is now no question that it can afford protection from an IRS summons. However, the Court declined to create a special category of protection for the opinion work product of an attorney, instead remanding that issue to the Sixth Circuit for reconsideration. This failure to indicate the standard applicable to opinion work-product is unfortunate. On rehearing the appellate court should adopt the "virtually immune" standard, finding that the memoranda and notes which the IRS seeks from *Upjohn* constitute the opinion work product of *Upjohn's* attorneys and conse-

standard used by the magistrate. Justice Rehnquist's choice of words shows that while the Court is reluctant to adopt the absolute immunity standard, it envisions a standard higher than the substantial need/undue hardship standard. Thus, the Court may prefer the "virtual immunity" standard for material that can be categorized as opinion work product. *Id.*

127 See Weissenberger, *supra* note 2, at 905; Comment, 47 GEO. WASH. L. REV. 413, 424 (1979).

quently are immune from discovery unless shown to be at issue in the case or to contain evidence of crime.

Gerald F. Lusk